IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1559 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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PATEL NANU BHAGWAN - Appellant(s)
Versus
THE STATE OF GUJARAT - Opponent(s)

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Appearance :
MR KARTIK V PANDYA for Appellant(s) : 1,
MS.PANDIT, ADDL.PUBLIC PROSECUTOR for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 30/10/2007

ORAL JUDGMENT

Heard Mr.K.V.Pandya, learned Advocate for the appellant and Ms.Pandit, learned A.P.P. for the respondent-State.

2 The appellant has challenged the legality and validity of the judgment and order of conviction and sentence passed by the learned Joint District & Additional Sessions Judge, 7th Fast Track Court, Veraval, passed in Sessions Case No.152 of 1999 on 19th August, 2004. The appellant-accused alongwith original accused No.2 were charged and tried for the offence punishable under Sections 451, 452, 307 and 398 of the Indian Penal Code and wherein at the end of trial, the learned Judge was pleased to acquit the original accused No.2 from the charges levelled against him and sentenced the appellant-accused No.1 as under:

- For the offence punishable under Sections 451 and 452, the appellant-accused to undergo six months rigorous imprisonment and to pay a fine of Rs.350/- and in default of making payment of fine to undergo fifteen days rigorous imprisonment respectively.

- For the offence punishable under Section 307 of the Indian Penal Code, the appellant-accused to undergo seven years rigorous imprisonment and to pay a fine of Rs.1,000/- and in default of making payment of fine to undergo two months rigorous imprisonment.

- For the offence punishable under Section 398 of the Indian Penal Code, the appellant-accused to undergo seven years rigorous imprisonment.

3. After some deliberation and going through the evidence of some of the witnesses, mainly the Prosecution Witness No.2-Jayaben w/o. Bhanubhai Gokal, who has been examined at Exh.10, Mr.Pandya, learned Advocate for the appellant has submitted that conviction recorded by the learned trial Judge for the offence punishable under Sections 451, 452 and 307 is not assailable on merits because the learned trial Judge has assigned good and sound reasons. However, he has submitted that quantum of punishment for the offence punishable under Section 307 is comparatively harsh. In such or similar cases normally the punishment of either three to five years would be adequate punishment.

4. It is submitted by Mr.Pandya that learned trial Judge ought not to have held the accused guilty of the charge of offence punishable under Section 398 of the Indian Penal Code, as there was no convincing evidence to bring home the charge for the said offence, considering the scheme of Section 393 and

398 of the Indian Penal Code. He has submitted that it was not the say of P.W.No.2-Jayaben that accused had ever attempted to snatch gold chain nor she has sustained injury with knife allegedly armed by the accused. As per say of this witness, she was alone in her house at about 1:30 p.m. She was not knowing the accused by name. Accused had entered into her house and by showing knife demanded gold chain but immediately thereafter she had started shouting and therefore the accused went away from the room. She had seen only one person.

4.1 The Police after investigation described two persons as accused persons and learned trial Judge at the conclusion of the trial decided to acquit the original accused No.2. According to prosecution, some persons of the same village, viz., Damji Mohan, etc. had chased the accused and injured Batukbhai was one of them. The victim has stated that the person who was chased by the village people, had inflicted knife blow on stomach of Batukbhai.

5. According to Mr.Pandya, the learned trial Judge ought to have acquitted the appellant for want of sufficient evidence from the charge of offence

punishable under Section 398 of the Indian Penal Code. No such witnesses have ever stated before the Court about the fact of seeing the accused person holding knife in his hand. On the contrary, it appears that accused perhaps took out the knife so that village people chasing him, may not catch him and take him to the village. So, the act of the accused was nothing but an attempt to commit robbery which is punishable under Section 393 of the Indian Penal Code.

6. Ms.Pandit, learned A.P.P. for the respondent-State submits that as per say of P.W.No.2, the accused had shown knife to her. The victim has also stated that though she was not knowing the accused either by name or otherwise, she had described the accused as person putting on clothes of particular colour i.e. cream colour. The victim has identified the accused in the open Court. The evidence as to the identity of the accused is convincing and therefore the conviction under Section 398 (a) of the Indian Penal Code cannot be said to be either bad or illegal.

7. Of course, the facts are materially

different but the observations made by the Apex Court, in case of ***Chinnadurai Vs. State of T.N., reported in A.I.R. 1996 SC 546***, would certainly help the accused where the Apex Court has held that on the evidence the conviction of the appellant under Section 398 of the Indian Penal Code is not sustainable especially when there was no actual robbery or dacoity can be said to have been committed. The Apex Court had found on facts that as such no property was removed from the house of the complainant and belongings were not even taken away by the accused, otherwise those could have been recovered form the accused. It would be beneficiary to reproduce the relevant paragraph 4 hereinafter.

> *"4. It seems to us that the conviction of the appellant under Section 398, IPC whereunder he has been sentenced to seven years' rigorous imprisonment cannot be sustained. Section 398, IPC gets attracted if at the time of attempting to commit robbery or dacotiy, the offender is armed with a deadly weapon which will attract an imprisonment not less than seven years. When no robbery or dacoity has been committed as such, in the sense that no property was removed from the house of the complainants and nothing said to be belonging to the complainants was recovered, it would be difficult to hold that there was any attempt in regard to the*

commission of robbery or dacotiy. Scattering of articles in the house may cause a scene as if ransacked, but that does not proved the charge. We thus feel that on the evidence, the conviction of the appellant under Section 398, IPC is not sustainable. Accordingly, the same is set aside."

8. In view of the above, it is submitted by Mr.Pandya that the accused at the most could have been held guilty of the charge of offence punishable under Section 393 of the Indian Penal Code and the punishment prescribed under Section 393 of the I.P.C., is to the extent of seven years. At present the appellant-accused is in prison since last about four and half years so if the substantive sentence is reduced to five years from seven years then the appellant would be satisfied. This is the second fold of argument advanced by Mr.Pandya.

9. Having considered the totality and the fact that the accused has not challenged the legality and validity of the judgment and order of conviction and sentence for the offence punishable under Sections 451, 452 and 307 of the Indian Penal Code, the submission made by Mr.Pandya should be accepted and the substantive sentence imposed by the learned trial

Judge should be reduced to five years from seven years. The circumstances on record shows that as such there was no intention to kill Batukbhai. Ultimately, this is a case of single blow which was found on body of the injured-Batukbhai and the nature of injury described by the doctor shows that very injury could have resulted into death of injured-Batukbhai. But the fact that accused had never inflicted that blow perhaps with an intention to kill Batukbhai, the punishment of five years would be adequate punishment for the offence punishable under Section 307 of the Indian Penal Code.

10. In the result, the present appeal is partly allowed. The judgment and order of conviction and sentence, so also, sentence of fine passed by the learned Joint District & Additional Sessions Judge, 7th Fast Track Court, Veraval, passed in Sessions Case No.152 of 1999 on 19th August, 2004, for the offence punishable under Sections 451 and 452 of the Indian Penal Code is hereby confirmed.

10.1 While confirming the judgment and order of conviction, the order of sentence for the offence punishable under Sections 307 of the Indian Penal

Code, is hereby modified and reduced to five years instead of seven years rigorous imprisonment.

10.2 The conviction for the offence punishable under Section 398 is hereby modified and converted into Section 393 of the Indian Penal Code. However, the substantive sentence imposed for the offence punishable under Section 393 of the Indian Penal Code is reduced to five years instead of seven years rigorous imprisonment without altering the in default punishment and sentence of fine. All the sentences shall run concurrently.

10.3 The accused-appellant is ordered to be set at liberty forthwith, if he has served the sentence, so also, if not required in any other case. Order and Direction accordingly.

(C.K.BUCH, J.)

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